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No. 533

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In the Supreme Court of the United States

October Term, 1941

[redacted]

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 532

C. D. CALBECK, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

THE TRAVELERS INSURANCE CO. AND LEVINGSTON SHIPBUILDING CO.

P. J. DONOVAN, DEPUTY COMMISSIONER, BUREAU OF EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

AVONDALE SHIPYARDS, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

This reply brief is being filed in order to answer a new argument raised in this Court for the first time by respondent Avondale in its brief on the merits.

Avondale now contends that the employee's acceptance of checks which indicated that they represented payments under the Louisiana Workmen's Com-

pensation Act precludes recovery under the Longshoremen's Act (Respondent Avondale's Brief, pp. 25–26).[1] Avondale apparently contends that the acceptance of these checks constituted an election by the employee of his remedy under State law, thus precluding recovery under the Longshoremen's Act even if the injury is covered thereunder (Avondale's Brief, pp. 25–26).

The short answer to this contention is that the courts have uniformly held that an employee's acceptance of voluntary payments under a State act does not preclude recovery under the Longshoremen's Act. *Massachusetts Bonding & Insurance Co. v. Lawson*, 149 F. 2d 853 (C.A. 5); *Newport News Shipbuilding & Dry Dock Co. v. O'Hearne*, 192 F. 2d 968 (C.A. 4); *Western Boat Building Co. v. O'Leary*, 198 F. 2d 109 (C.A. 9). Accord: *Pacific Employers Insurance Co. v. Pillsbury*, 130 F. 2d 21 (C.A. 9), and *Kliebenstein v. Standard Dredging Co.*, 81 F. 2d 670 (C.A. 5) (Jones Act suits not barred by claim under State compensation act). See also, *Teichman v. Lofland Brothers Company*, 294 F. 2d 175 (C.A. 5), certiorari denied, 368 U.S. 948; *Wilkes v. Mississippi River Sand & Gravel Co.*, 202 F. 2d 383 (C.A. 6). Indeed, the courts have held that even an award and order to pay compensation under a State act does not preclude a claim under the Longshoremen's Act. *Newport News Shipbuilding & Dry*

[1] Respondents Travelers Insurance Company and Levingston Shipbuilding Company make no such contention, although the claimants in that case apparently received a small sum of money under the Texas Workmen's Compensation Act (R. 12).

Dock Co. v. *O'Hearne, supra; Western Boat Building Co.* v. *O'Leary, supra.*

It is also important to note that the Deputy Commissioner did allow Avondale to set off the payments made under the State act against those due under the Longshoremen's Act (R. 93–94). Accordingly, Avondale was in no way prejudiced by the employee's failure to file his claim with the Deputy Commissioner prior to November 1958.[2] It merely seeks to take advantage of the fact that the State of Louisiana limits the maximum workmen's compensation payments to $35 a week, with a $14,000 total, in contrast to the more liberal provisions of the Longshoremen's Act, which in this case provide benefits which are 9.6 times the amount receivable under the State act (see our main brief, pp. 10–11).[3] Avondale has offered no other reason for this Court to adopt a rule which would bar an employee's claim because of the form in which an employer made compensation payments concededly due him.[4]

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[2] Avondale has never contended that the claim was barred by the Act's one year period of limitations. 33 U.S.C. 913; R. 68–69, 78–79.

[3] The Longshoremen's Act has no limitation on total recovery. The $54 a week maximum has, since the injury here, been raised to $70. Pub. L. 87–87, approved July 14, 1961, 75 Stat. 203; 33 U.S.C. (Supp. III) 906(b).

[4] Avondale does suggest that upholding the award here would be giving an employee "two bites at the cherry" (Avondale's Brief, p. 26). But this case does not involve an employee who has lost on the merits before a State agency and then seeks compensation for the same injury under the Longshoremen's Act. The employee here never had his claim adjudicated by any State official and never filed any claim for State compensation.

At any rate, the facts in this case do not establish an "election" by the employee to obtain compensation under the State act. Minus Aizen made no claim, filed no suit for benefits under State law, and took no affirmative steps to "elegt" a remedy under State law. He merely accepted the checks sent him by his employer, which were due him regardless of whether he was covered by the State act or by the Longshoremen's Act. In fact, the benefits paid to him by Avondale were considerably in excess of those due under the State act and were approximately those due under the Longshoremen's Act.[3] In these circumstances, it is clear that the employee cannot be said to have made a binding election to seek recovery solely under State law. And the Deputy Commissioner was plainly justified in refusing to find such an election. *O'Leary* v. *Brown-Pacific-Maxon*, 340 U.S. 504.

[3] In addition to the $35 a week due under the State act, Avondale paid claimant $3830 marked "advance on compensation", so that the total payments were approximately those due under the Longshoremen's Act (R. 89–90, 93). Similarly, Avondale furnished medical and surgical treatment, at an expense of $7000, although the maximum payable under State law was $2500 (Avondale's Brief, p. 4).

CONCLUSION

For the foregoing reasons, and those set forth in our main brief, the judgments of the court of appeals should be reversed and the judgments of the district courts reinstated.

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